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No. 99-

IN THE

Supreme Court of the United States

PAUL DAVID WOOSLEY,

Petitioner,

v.

DAVID SMITH; KIMBERLY SMITH, h/w; THE ADOPTION ALLIANCE; MARILYN J. MONTGOMERY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Do federal courts have jurisdiction to declare state court judgments void *ab initio*; and if so, must such void judgments be challenged within the statute of limitations for bringing a civil rights action.

Is a Fourteenth Amendment violation claim or a federal civil rights action justiciable against a state court that usurped jurisdiction and disregarded due process by issuing and upholding a void judgment.

Is the termination of parental rights subject to contractual arrangements.

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Petitioner, Paul David Woosley ("Woosley"), respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is not published (App. A). The opinion of the district court in *Woosley v. Smith, et al.*, Civ. No. 96-CV-02368 is not published (App. B).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit ("Court of Appeals") was entered on August 25, 1999. The Court of Appeals denied a timely petition for rehearing on September 21, 1999. (App. E).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

The Fourteenth Amendment to the United States Constitution provides in relevant part: ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law ."

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute . . . , of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

STATEMENT OF THE CASE

The fundamental question in this case is whether federal courts have the jurisdiction and the duty to declare as "void *ab initio*" state court judgments entered against a non-resident when that state court lacked jurisdiction and did not provide the non-resident an opportunity to be heard.

Another way of presenting the question is to ask whether a litigant is entitled to seek relief from a void state judgment in a court system other than the one which usurped jurisdiction.

A. Background of the state court judgments

Viewed in the totality of circumstances, petitioner Woosley is the victim of a barbaric bait-and-switch. This case represents what appears to be an increasing trend whereby children are spirited across the country to commence custody actions and are then immediately re-transferred out of that state. On July 8, 1992 a child was born to Woosley

and his long-term girlfriend, who was legally separated from her husband pending a subsequent divorce. The child was born in Sewickley, Pennsylvania where both parents resided. At the mother's request during a stressful time. Woosley provisionally signed an Affidavit of Waiver of Interest in Child ("Affidavit") giving *temporary* custody to an agency.

This Affidavit states in relevant part:

> I have further been informed that if I execute this instrument and do not take the necessary steps to claim the rights of a parent, a Court of Competent jurisdiction may enter a judgment that will forever prevent me from asserting any rights I wish to claim in and to the child.

Under the laws of the Commonwealth of Pennsylvania, Woosley and similarly-situated Pennsylvania parents are accorded a minimum of 50 days ("waiting period") after signing such documents to make their final decision before a hearing can occur to terminate parental rights. (23 Pa. Cons. Stat. Ann. § 2504). The Pennsylvania legislature recognized that the birth of a child is a life-changing event deserving consideration, so these laws are designed to provide a limited decision-making period.

Woosley contacted the defendant adoption agency within the waiting period and asked to parent his son. He was shocked to learn that his parental rights had purportedly been terminated only one week after his child was born in a Texas courtroom more than 1500 miles from his residence. If Woosley's child ever entered Texas, which has not been established due to contradictory testimony, then he was present in that state for

only a few days because he was expeditiously whisked away to Connecticut by the prospective adoptive parents.

As the language above indicates, the Affidavit was not a relinquishment nor a surrender of Woosley's parental rights. In accordance with Pennsylvania statutes, the Affidavit was signed more than 72 hours after the birth, thereby giving Woosley confidence that any subsequent proceedings would also comply with Pennsylvania law. (23 Pa. Cons. Stat. Ann. § 2711).

Woosley did not waive his right to have the laws of his residence apply to him, nor does he have the ability to do so under these circumstances, as discussed later in this petition. Moreover, it would be unconscionable to exploit new parents at an emotionally-vulnerable moment by asking them to waive the very rights designed to protect them during that thought-provoking period.

Based upon the defendants' own documents, it is undisputed that they were aware that Woosley affirmatively asked to raise his child within the mandated waiting period. Woosley also notified the Interstate Compact Commissions in Pennsylvania, Texas, and Connecticut. In fact, the very same day that Woosley was finally able to speak with the executive director of the defendant adoption agency, he sent $1500 by Federal Express to retain a San Antonio law firm to contest the Bexar County proceedings.

The Connecticut Interstate Compact office initially refused to permit placement because they noticed the unusual usage of a Texas court to terminate the parental rights of Pennsylvania parents. Rather than decline jurisdiction at this juncture, the Texas court instead issued a follow-up Order to "Reaffirm the Decrees of Termination."

All of these actions occurred within Pennsylvania's minimum waiting period, so it is virtually certain that Woosley would have successfully objected to any prospective termination of his rights if he had been given a full and fair opportunity.

Contrary to the opinions below, there were no related proceedings on September 24, 1992. (App. A at 3a, 10a; App. B at 19a). This is the date that Woosley's initial counsel filed a Notice of Appearance, but despite this neither Woosley nor his attorneys were ever notified of the pendency of any proceedings.

Woosley has always maintained that the Texas decrees terminating the parental rights of the Pennsylvania parents and granting an adoption to Connecticut residents are void due to total lack of jurisdiction, violation of due process since no notice was provided, and extrinsic fraud since the timing and location of the proceedings were concealed. The natural parents were not even named as defendants in these actions — they were not provided with a realistic opportunity to contest these decrees before they were issued.

Woosley initially sought to directly attack the void decrees in the Texas court where they were issued. Any delays in bringing the action and any subsequent delays were the result of a zealous adoption cartel and legal practitioners in a region more than 1500 miles from the parents' residences and the birthplace of the child.

The first Texas judge to hear the case in March 1994 indicated in a written statement that he would rule in Woosley's favor and vacate the decrees due to a lack of subject-matter jurisdiction. Before signing an order, however,

this judge mysteriously recused himself without explanation and the case eventually went before a second county judge in June 1995. This second judge, without written opinion and without stating his reasons, denied Woosley's motion to set aside the void decrees. Woosley timely appealed. After an ascerbic denial by the Texas Fourth Court of Appeals ending in August 1996, Woosley filed this underlying federal claim on December 31, 1996.

B. The Proceedings Below

The primary relief sought from the Federal District Court is a declaratory judgment that the Texas decrees are void *ab initio* and that the Pennsylvanians' parental rights have not been terminated due to the Bexar County court's complete lack of jurisdiction and violation of due process as described above.

Since neither the parents, the child, nor the adoptive parents have ever been residents of Texas, Woosley claims a violation of the Fourteenth Amendment and asked the District Court to act as a protectorate of his constitutional rights in light of the Texas courts' refusal to do so.

Woosley also filed a civil rights action and a fraud claim against all defendants. The fraud claim was a reinstatement of his severed Texas tort claim, which was dismissed *without prejudice* on March 4, 1996, based upon 42 Pa. Cons. Stat. Ann. § 5535(a). (App. A at 9a). Woosley eventually filed a timely motion to amend the complaint and add new parties, wherein he attempted to add as defendants the Bexar County court and a private individual who was described as the "architect" of the adoption scheme that inappropriately utilized the Texas courts.

Woosley contends that the District Court abused its discretion by severely limiting his amendment of the Complaint. (App. D at 31a). The slivered complaint was then dismissed as time-barred (App. B at 17a; App. C at 28a).

As to Woosley's primary claim for a declaratory judgment that the Texas decrees are void, the District Court reasoned, in apparently unprecedented fashion, that this equitable claim has a "concurrent legal remedy" with a civil rights action since they both involve a redress for violations of due process. (App. B at 25a). The District Court concluded that a declaration of voidness must be sought within the limitations period for a civil rights action.

Woosley timely appealed to the Third Circuit Court of Appeals, which affirmed the District Court's dismissal and denied a petition for rehearing and rehearing *en banc*. The panel also decided to withhold declaratory relief on the basis that the equitable claim of voidness was essentially predicated upon the same cause of action as the civil rights claim for monetary damages. (App. A at 11a n.7). The Third Circuit panel also stated that federal subject matter jurisdiction was questionable in this case due to the *Rooker-Feldman* doctrine and the domestic relations exception. (App. A at 11a, 12a n.8).

None of the decisions in any of the courts below addressed the overarching merits of Texas' lack of jurisdiction, nor do they hint of any impropriety or mention the odor of impermissible forum shopping that pervades this case. This sidestepping portends poorly for out-of-state litigants who are unwittingly subjected to void judgments from foreign states. The opinion below suggests that these litigants must undergo the burden, inconvenience, and

expense to contest these judgments in potentially distant and unsympathetic fora, and also trivializes the role of federal courts as a guarantor of federal rights.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS AND OTHER CIRCUIT COURT HOLDINGS CONCERNING FEDERAL INTERVENTION INTO VOID STATE JUDGMENTS ISSUED WITHOUT JURISDICTION.

This Court has consistently stated that judgments entered without jurisdiction are void. *Burnham v. Superior Court of Cal.*, 495 U.S. 604 (1990); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

Recalling "a long and venerable line" of cases, the Court reiterated in *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. __, slip op. at 1 (1999) that "[j]urisdiction is power to declare the law," and " '[w]ithout jurisdiction the court cannot proceed at all in any cause.' " (*quoting Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 94 (1998) (*quoting Ex parte McCardle*, 7 Wall. 506, 514 (1869))).

Although the purpose of this petition is not to conclusively demonstrate that the Texas decrees fall into the category traditionally known as "void", the basic facts leading to this assessment are not in dispute.

Texas has never been the home state of Woosley's son as contemplated by 28 U.S.C. § 1738A, nor was the child domiciled in Texas by the standards established in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989). Neither the parents nor the child established minimum contacts with Texas, and since Woosley was never notified that a Texas proceeding to terminate his parental rights was contemplated, he did not purposely avail himself of the laws of Texas, nor did he have a "full and fair opportunity to litigate" the issue. *Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 250 (1998). The Texas decrees "cannot command obedience elsewhere on a matter the [Texas] court lacks authority to resolve." *Id.* at 241, referencing *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 282-283 (1980) (plurality opinion).

Practically speaking, these holdings would be barren rhetoric unless federal district intervention were permissible. As stated in *Burnham*, 495 U.S. 604, 639 n.13:

> States have little incentive to limit rules such as transient jurisdiction that make it *easier* for their own citizens to sue out-of-state defendants. . . . Out-of-staters do not vote in state elections or have a voice in state government. We should not assume, therefore, that States will be motivated by "notions of fairness" to curb jurisdictional rules like the one at issue here.

Presently, the Texas court's clear usurpation of power without notice is so offensive to "traditional notions of fair play and substantial justice" that it should outweigh intersystem preclusion doctrines such as *Rooker-Feldman. International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945).

Such an exception to these doctrines has been discussed by this Court and others. For example, in *Ritter v. Ross*, 992 F.2d 750, 754 (7th Cir. 1993):

> There is, unfortunately, no bright line that separates a federal claim that is "inextricably intertwined" with a state court judgment from a claim that is not so intertwined. . . . Justice Brennan, the author of *Feldman*, stated his belief in *Pennzoil* that the inferior federal courts are not forced into this impermissible appellate review when the constitutional claims are " 'separable from and collateral to' the merits of the state-court judgment." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 21 (1987).

In Re Lake, 202 B.R. 751 (9th Cir. BAP 1996) advises that a void state judgment "is subject to collateral attack in a court of the state that rendered the judgment or in a federal court." (*citing Heiser v. Woodruff*, 327 U.S. 726, 736 (1946); *Kalb v. Feuerstein*, 308 U.S. 433 (1940); *United States v. Fallbrook Pub. Util. Dist.*, 347 F.2d 48, 59 n.9 (9th Cir. 1965) (federal courts have authority to grant relief from state court judgments)).

"A void judgment is subject to both direct and collateral attack, while a judgment that is merely voidable must be corrected through ordinary appellate or other direct procedures." *Matter of Gober*, 100 F.3d 1195 (5th Cir. 1996).

The Third Circuit explained its view of *Rooker-Feldman* limitations in *In Re James*, 940 F.2d 46, 52 (3rd Cir. 1991):

> There appears to be only one exception to this hard and fast rule of federal-state comity, and it comes into play only when the state proceedings are considered a legal nullity and thus void *ab initio*. *Kalb*, 308 U.S. at 438-40 . . . It bears emphasis to repeat that federal courts that are classed as "inferior" under Article III have the power to vacate only state court judgments that are considered void *ab initio*. Sound jurisprudential reasons underlie this concept. Because a void judgment is null and without effect, the vacating of such a judgment is merely a formality and does not intrude upon the notion of mutual respect in federal-state interests.

Based upon this dicta, Woosley's federal claim should proceed precisely on the grounds that the Texas decrees are void *ab initio* since that determination would not intrude upon the notions of equity, comity, and federalism. This federal claim concerns jurisdiction and due process. It does not go to the merits of the underlying Texas decrees, which were predicated upon an erroneous theory of abandonment, nor has Woosley sought review of the decision of the Texas Fourth Court of Appeals (App. A at 5a). Although the void state-court judgments happen to involve custody, this federal action is " 'separable from and collateral to' the merits of the state-court judgment"; accordingly, these constitutional claims are not an impermissible review under the *Rooker-Feldman* doctrine or the domestic relations exception. *Pennzoil*, 481 U.S. at 21.

Homola v. McNamara, 59 F.3d 647, 650 (7th Cir. 1995), on the other hand, suggests that the federal court house door should be closed to anyone seeking to overturn a state-court

judgment for any reason, regardless of constitutional infirmity. In the opinion below, the Third Circuit is leaning toward those "rigid pigeonholes". *Pennzoil,* 481 U.S. 11 n.9. The opinion below concedes, however, that federal subject-matter jurisdiction is merely "questionable" or "doubtful". (App. A at 11a, 12a). By granting this petition, this Court could mitigate the doubtfulness in these kinds of cases.

This Court should seize the opportunity to settle these compelling discrepancies among the United States courts of appeals. By granting this petition, this Court could clarify the profundity of void judgments and affirm that court-crafted doctrines are general principles of policy, not inexorable commands.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW MISAPPLIES THIS COURT'S PRIOR RULINGS REGARDING THE DOMESTIC RELATIONS EXCEPTION.

The Court of Appeals noted that the domestic relations exception suggests lack of federal subject-matter jurisdiction. (Appendix A at 12a n.8).

In *Ankenbrandt v. Richards*, 504 U.S. 689, 704 (1992) this Court concluded "that the domestic relations exception encompasses only cases involving the issuance of a divorce, alimony, or child custody decree."

It cannot be overemphasized that the basis of this federal claim concerns proper jurisdiction and due process, not domestic relations. Woosley seeks a federal declaration that

his parental rights have not been terminated because the Texas decrees are void, so his claim does not encompass the *issuance* of a child custody decree.

Any further litigation subsequent to this federal case to modify custody or grant visitation, should any occur, must take place in a state court with proper jurisdiction, which does not include any court in Texas. A competent state forum can consider best interests, laches, diligence, and a complex of factors which are within the exclusive province of state courts.

Regardless of the underlying issues, litigants must not be forced to contest void judgments in rogue state courts. To hold otherwise would encourage even more forum shopping for family matters. As eloquently stated in *Bell v. Hood*, 327 U.S. 678, 684 (1946):

> Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. . . . federal courts may use any available remedy to make good the wrong done.

The Third Circuit cited *Allen v. Allen*, 48 F.3d 259, 261 (7th Cir. 1995), which incorrectly read *Ankenbrandt*. Woosley's petition should be granted to clarify the domestic relations exception and thereby discourage cross-country shenanigans in family affairs.

III.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW MISAPPREHENDS "CONCURRENT JURISDICTION" AND CONFLICTS WITH THIS COURT'S PRIOR RULINGS THAT POST-DEPRIVATION REMEDIES DO NOT SATISFY DUE PROCESS.

The courts below stated that an equitable declaratory judgment action to vacate void decrees must be brought within the limitations of time for a civil rights claim for monetary damages. (App. A at 11a n.7). This unprecedented notion, which would transmute a basic guarantee into an illusory promise, is antithetical to the traditional principle that post-deprivation remedies do not satisfy due process. *Stanley v. Illinois*, 405 U.S. 645, 647 (1972); *Parratt v. Taylor*, 451 U.S. 527, 545 (1981).

An equitable claim that certain decrees are void *ab initio* does not fall under the principles of "concurrent jurisdiction" with a civil rights claim for monetary relief, and none of the authorities cited in the opinions below supports this broad proposition. (App. B at 23a-25a). These two kinds of claims are very distinct, even though they may arise from the same set of facts, so equity in this instance should not withhold its relief since voidness is not predicated upon civil rights statutes. *See Burnham*, 495 U.S. at 608-609. ("The proposition that the judgment of a court lacking jurisdiction is void traces back to the English Year Books . . . American courts invalidated, or denied recognition to, judgments that violated this common-law principle long before the Fourteenth Amendment was adopted.")

This distinction is confirmed in *Federal Election Commission v. Christian Coalition*, 965 F. Supp. 66, 72 (D.D.C. 1997), a case cited several times by the Magistrate Judge (App. B at 23a-24a):

> Only in such a "concurrent jurisdiction" situation can the rule of *Cope* be read to require a court to withhold relief because a statute of limitations bars the legal remedy. Where the jurisdiction is "exclusive", such as where the nature of the remedy is an injunction that is independent from the legal relief available, then the statute of limitations applicable to the legal relief is inapplicable to the injunctive relief. *Russell*, 309 U.S. 280, 60 S.Ct. 527. "And so, a suit in equity may lie though a comparable cause of action at law would be barred." *Holmberg*, 327 U.S. at 396, 66 S.Ct. at 584.

In the case at bar, jurisdiction is "exclusive". Woosley's substantive claim that the Texas decrees are void is completely independent from any legal relief that may be available under 42 U.S.C. § 1983. The measured language of the civil rights statute purposefully allows for this distinction, stating "in an action at law, suit in equity, or other proper proceeding for redress." (42 U.S.C. § 1983).

For good reason, litigants are free to ignore void judgments. Admonishing them to contest these judgments within a certain time after they became aware of them would be unreasonable — especially if adversaries waited to collect until after the limitations period expired.

This Court should grant Woosley's petition and exercise its supervisory power to correct the Third Circuit's erroneous and unprecedented interpretation of prior cases regarding the distinctions between "concurrent" and "exclusive" jurisdiction.

IV.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW DISREGARDS TRADITIONAL HOLDINGS THAT VOID JUDGMENTS MAY BE SET ASIDE DESPITE ANY STATUTE OF LIMITATIONS OTHERWISE APPLICABLE.

"The cases say that a void judgment acquires no validity as the result of laches on the part of the adverse party." *Misco Leasing Inc. v. Vaughn*, 450 F.2d 257, 260 (10th Cir. 1971) (*citing Taft v. Donellan Jerome, Inc.*, 407 F.2d 807, 808 (7th Cir. 1969); *Austin v. Smith*, 312 F.2d 337, 343 (D.C. Cir. 1962)).

"A judgment that is void . . . may be set aside at any time despite any statute of limitations otherwise applicable to an action to set aside such a judgment." *Weaver v. Frazee*, Kan., 547 P.2d 1005, 1007 (1976) (explaining that a 17-year-old judgment would be vacated).

"A void judgment may ordinarily be attacked at any time." *United States v. Whedbee*, 946 F.2d 330, 334 n.6 (4th Cir. 1992). Void judgments do not ripen into acceptable judgments with the mere passage of time.

These long-standing principles are succinctly summarized in *Moore's Federal Practice*, ¶ 60.25, at 60-

224 (2d ed. 1983), which states that a void "judgment may also be collaterally attacked at any time in any proceeding, state or federal . . . these principles are equally applicable to a void state judgment."

For example, *Shroeder v. City of New York*, 371 U.S. 208 (1962) concluded there was a denial of due process through lack of notice. The taking occurred in 1952 and the statutory limitation was three years. This Court nevertheless held that Mrs. Schroeder could maintain her action for compensation filed eight years after the deprivation.

The opinions below conflict with all of these consistent precedents, and the Third Circuit's decision cites no authorities that any void judgments have been upheld because they were challenged after some statute of limitations had expired.

The court confirmed that "courts have developed tolling principles to 'ameliorate the sometimes harsh effects' of the statute of limitations." (Appendix A at 7a).

Woosley did not sleep on his rights[1]. As indicated on page 4 above, Woosley decisively demanded to parent his

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1. With the benefit of hindsight, perhaps it is obvious that Woosley should have filed a concurrent federal claim despite the implications for judicial economy and despite the likelihood that the District Court would have stayed its hand owing to abstention doctrines such as *Colorado River*. None of the legal professionals Woosley consulted even suggested that he consider a federal action. Whether because of the domestic relations exception or unfamiliarity with federal relief, the logical and seemingly expeditious and unique forum to contest the void judgments was in the Texas court that

(Cont'd)

first-born son even before he became aware of the Texas decrees. He has diligently pursued this cherished right, in one court or another, ever since.

The firm Woosley initially retained fraudulently pretended to represent him and all three lawyers were eventually suspended from practice on unrelated matters. *See Kimes v. Stone,* 84 F.3d. 1121, 1127 n.3 (9th Cir. 1996). Had Woosley lived in the San Antonio area, he would have known from media broadcasts to avoid this firm, which highlights one of the reasons why judgments issued without jurisdiction and without notice are void. Despite this compounded miscarriage of justice, Woosley filed his Texas suit *less than one year* after the Decree of Termination was issued, thereby falling within any conceivable statute of limitations.

A tenet of American jurisprudence is that a court cannot violate due process and thereby commit a wrong just because it could be undone if the aggrieved litigant were savvy enough or lucky enough to navigate the vagaries of that court system. *See Stanley*, 405 U.S. at 647.

Thus far, despite Woosley's personal diligence, no court has attempted to explain why the Texas court had jurisdiction over the parties or the subject matter. The child is nearly eight years old, but allowing these void decrees to stand

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(Cont'd)
issued them. In the spirit of *Heck v. Humphrey*, 512 U.S. 477 (1994), wherein a civil rights action does not accrue until the conviction is overturned, Woosley contends that a civil rights claim based upon a void judgment should not accrue until the judgment is actually declared "void". This, in essence, is what the Court did in *Schroeder, supra*.

would provide even more incentive for desperate parties to use fraudulent means to obtain judgments and then use dilatory tactics as was done here. Free enterprise should not triumph over due process.

By granting Woosley's petition, this Court can clarify whether the phrase "void judgment" has any practical meaning or is simply a rhetorical device to discourage injustice.

V.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS ON CIVIL RIGHTS CLAIMS AGAINST STATE JUDICIAL PROCEEDINGS.

Another question presented is whether a Fourteenth-Amendment-violation claim or a federal civil rights claim can proceed against a state court that issued and upheld a void judgment.

Woosley filed a timely motion to add, *inter alia*, the Texas Bexar County District Court as a party to his action. Woosley contends that the District Court abused its discretion by emphatically limiting the amendment of his Complaint. (App. D at 31a).

The crux of Woosley's claim is that the Texas trial court, without precedential basis and without notice to Woosley, acted unconstitutionally by issuing and upholding a decree terminating his parental rights without personal or subject-matter jurisdiction.

In *Mitchum v. Foster*, 407 U.S. 225, 240 (1972), this Court squarely held:

> It is clear from the legislative debates surrounding passage of § 1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment "against state action, . . . whether that action be executive, legislative, or *judicial*." *Ex parte Virginia*, 100 US 339, 346, 25 L Ed 676, 679 (emphasis supplied). Proponents of the legislation noted that state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights.

Furthermore, the syllabus in *Pulliam v. Allen*, 466 U.S. 522, [541] (1984), confirms that "Congress intended § 1983 to be an independent protection for federal rights, and there is nothing to suggest that Congress intended to expand the common-law doctrine of judicial immunity to insulate state judges completely from federal collateral review."

Applying these considerations to the case at bar, the Bexar County court upheld the void decrees by signing an order denying relief on August 22, 1995. Woosley contends that these Texas proceedings were undertaken in bad faith and amount to a continuing wrong causing him irreparable injury.

Although *Wilson v. Garcia*, 471 U.S. 261, 285 (1985) merits revisiting for the well-expressed reasons in the dissenting opinion, Woosley filed this federal claim on

December 31, 1996. This falls within the two-year statute of limitations based upon the unconstitutional upholding (in the original county court) of the void judgments.

State courts should not enjoy an anachronistic notion of absolute sovereign immunity, but should be held accountable for their actions that do not fall within judicial immunity. In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), this Court discussed the assertion that the Eleventh Amendment is intruded upon by the powerful Fourteenth Amendment to permit federal claims against the States by individuals in federal court. The seminal opinion in *Seminole*, with four dissentient justices, should encourage this Court to adopt portions of the dissenting opinion in *Quern v. Jordan*, 440 U.S. 332, 349 (1979) to allow the possibility that a State and state agencies could qualify as a "person" for the purposes of 42 U.S.C. §§ 1983, 1988.

Based upon this Court's prior rulings, this federal action, in part, is an original Fourteenth-Amendment-violation claim against *all* the Texas county court proceedings; therefore, this claim should be heard on its merits and not summarily dismissed before the proposed defendants have even had an opportunity to respond.

Woosley raised this issue on appeal, but it was not addressed by the circuit court. Woosley's petition should be granted so that the Court may affirm that unconstitutional state judicial proceedings can be challenged in federal courts and confirm that the guarantees espoused in *Mitchum* and its progeny are not a barren promise.

VI.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW DISREGARDS THIS COURT'S PRIOR RULINGS THAT THE TERMINATION OF PARENTAL RIGHTS AND ADOPTION PROCEEDINGS ARE NOT SUBJECT TO CONTRACTUAL ARRANGEMENTS.

Another question presented is whether the termination of parental rights is subject to contractual arrangements.

It is self-evident that the termination of parental rights is not accomplished by contract; elsewise, there would be no need for a formal termination hearing unless a dispute arose. There has also been a longstanding tradition to discourage baby brokering. Contractual arrangements in this domain are thereby unacceptable because they would lead to unscrupulous practices and misunderstandings; accordingly, procedural safeguards are established by statute for the protection of all parties.

This Court affirmed these principles in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989). There, the natural parents deliberately chose to give birth outside of their reservation in Mississippi in 1985 and signed consent-to-adoption forms. The 1986 Final Decree of Adoption was vacated as void, affirming that jurisdiction of the subject-matter must arise by law and not by mere consent, and confirming that statutes governing the termination of parental rights are "procedural safeguards". *Id.* at 36. This Court also noted that "a state-law definition of domicile would likely spur the development of an adoption brokerage business." *Id.* at 46 n.20.

Analogously, neither Woosley nor any of the other parties had the ability to choose which states' laws would govern the termination of parental rights given the circumstances of this case. The supreme law of the land dictates that the Commonwealth of Pennsylvania was the exclusive forum according to the Parental Kidnapping Prevention Act of 1980 (28 U.S.C. § 1738A) and the Uniform Child Custody Jurisdiction and Enforcement Act.

The opinions below reject these concepts, implying that since Woosley signed "something", he is not entitled to the alienable rights of Due Process like other similarly-situated parents. It would be a mistake to presume that the courts below have diligently pursued the facts and applied the law to those facts. The Third Circuit panel stated that "Woosley admittedly signed an affidavit relinquishing his parental rights to his biological son, but changed his mind and sought custody of the child." (App. A at 2a).

In fact, Woosley has never admitted relinquishing his parental rights. Although the respondents are fond of quoting portions of the ambiguous Affidavit which do not apply to Woosley but apply only to a presumed father, nowhere does the Affidavit state that it is irrevocable, nor does it indicate that it will be used in any venue outside the parents' residence. Woosley signed an Affidavit of Waiver of Interest allowing an adoption agency to have temporary custody of his child while the parents made their ultimate decision. A signature on a vague Affidavit must not be construed as an instantaneous termination of parental rights.

Since the panel cannot possibly know the complex state of Woosley's mind or spirit when he signed the Affidavit, they should not presume that he "changed his mind" or second-guess his intentions.

More importantly, under Pennsylvania law parents have every right to change their minds and this basic guarantee should not be deemed waiverable.

Although the pre-prepared Affidavit that Woosley signed contained a waiver of notice, this is not a waiver of personal jurisdiction, nor does it pass the famous test of *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314 (1950):

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of action and afford them an opportunity to present their objections.

See Restatement (Second) of Judgments § 2, *i. Waiver of Notice*, p. 44 (1980) ("It is also possible for a person by contract to waive notice in advance of litigation. Yet because notice is regarded as so important, many jurisdictions refuse to give effect to such contractual provisions. Where their validity is recognized, under the Due Process Clause they may be given effect only if the waiver was voluntary and with full appreciation of its significance and consequences. . . . It may be, therefore, that a waiver agreement will assuredly be given effect only when made by a person experienced in affairs of business who made such an agreement through negotiations that focused on the matter.")

Under these circumstances, it would be incongruous to ask new parents to waive notice without benefit, but such a waiver should be considered meaningless if they ultimately decide to parent during the mandated waiting period. Besides,

the parent must receive affirmative notice so that they can have an opportunity to assert that they signed under unacceptable conditions or assert that the signature was forged. Moreover, it would be uncivilized to hoodwink new parents, at an emotionally-vulnerable time, to waive the very rights conferred to protect them at that very emotionally-vulnerable time. Even in cases involving matters as sacrosanct as adoption, "finality" should not always trump "validity". *In Re Lake* at 759.

Accordingly, Woosley seeks prospective relief in the form of a declaration that the termination of parental rights is not subject to contractual arrangements, meaning that notice, jurisdiction, and other procedural safeguards cannot be waived. This would prevent others elsewhere from exploiting the Affidavit, which still shows unfilled blanks at the top for "STATE" and "COUNTY". More importantly, this would help to alleviate future miscommunications in this sensitive domain.

Woosley's petition should be granted so that this Court can affirm that procedural safeguards must be observed for the benefit of the parties and of society.

CONCLUSION

This case presents a question of exceptional importance concerning judgments — whether federal district courts can grant relief or declare as "void *ab initio*" a state court judgment issued against a non-resident of that state and issued without jurisdiction and without providing a realistic opportunity for the non-resident to contest the judgment.

By granting Woosley's petition for certiorari, this Court can correct the Third Circuit's decision, which defies this Court's longstanding holdings that judgments issued without jurisdiction are void and that post-deprivation remedies do not satisfy due process. In so doing, this Court can also reaffirm that the termination of parental rights is not subject to contractual arrangements, but instead that adoptions must proceed according to proper state statutes for the protection of all involved.

Given the totality of circumstances, the opinions below are unprecedented, unjudicial, unjust, and unfair. It would be appreciated if this Court would seize the opportunity to reexamine and clarify these important issues.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED AUGUST 25, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-3563

PAUL DAVID WOOSLEY,

Appellant

v.

DAVID SMITH; KIMBERLY SMITH, h/w; THE ADOPTION ALLIANCE; MARILYN J. MONTGOMERY

On Appeal from the United States District Court
for the Western District of Pennsylvania
D.C. Civil Action No. 96-cv-02368
(Honorable Gary L. Lancaster)

Submitted Pursuant to Third Circuit LAR 34.1(a)
July 26, 1999

Before: SCIRICA and STAPLETON, *Circuit Judges*,
and SHAPIRO, *District Judge**

(Filed August 25, 1999)

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* The Honorable Norma L. Shapiro, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Appendix A

MEMORANDUM OPINION

SCIRICA, *Circuit Judge*.

Paul David Woosley appeals the order of the United States District Court of the Western District of Pennsylvania dismissing his federal suit. Woosley admittedly signed an affidavit relinquishing his parental rights to his biological son, but changed his mind and sought custody of the child. The issue on appeal is whether the District Court correctly dismissed his claims as untimely brought under 42 Pa. Cons. Stat. § 5524, the applicable Pennsylvania statute of limitations.

We will affirm.

I.

On July 8, 1992, Kymberly Fusco gave birth to Kyle Edward Smith ("Kyle") in Sewickley, Pennsylvania. Although Fusco was married to Nicolas Fusco at the time, it is uncontested that Paul David Woosley is the biological father of Kyle. Kymberly Fusco sought to place Kyle for adoption and executed an Affidavit of Relinquishment of Parental Rights shortly after his birth. Woosley claims he consulted with an attorney and learned that he had 40 days during which he could reconsider his decision to relinquish his parental rights to Kyle under Pennsylvania law. *See* 23 Pa. Cons. Stat. Ann. § 2504. Woosley contends appellee Marilyn Montgomery, a notary public and representative of the Adoption Alliance,[1] informed him that signing an

1. The Adoption Alliance is a Texas-based adoption agency.

Affidavit of Waiver of Interest in Child would only become effective if he chose to place Kyle for adoption. Woosley also contends neither Montgomery nor the affidavit stated that the termination of Woosley's parental rights would be subject to the laws of Texas. On July 11, 1992, Woosley signed the affidavit and Montgomery brought Kyle to San Antonio, Texas.

The Adoption Alliance filed a petition to terminate the parent-child relationship seeking to place Kyle in the custody of the prospective adoptive parents, appellees David and Kimberly Anne Smith, who were residents of Connecticut. On July 15, 1992, the Bexar County Court in Texas entered a decree terminating the parental rights of Kyle's biological parents. On July 22, 1992, the Bexar County Court entered a second decree terminating the parental rights of the presumed father, Kymberly's husband. On July 24, 1992, thirteen days after he had signed the affidavit, Woosley claimed he informed Alliance that he wished to revoke his decision to waive his interest in Kyle. On August 14, 1992, pursuant to arrangements made by Alliance, the State of Connecticut Department of Children and Youth Services Interstate Compacts Office approved Kyle's adoption by the Smiths. Although Woosley allegedly continued to contact Alliance throughout August 1992, he claimed that it was not until August 26, 1992, that Alliance informed him that his parental rights had been terminated by the Texas court. At that point, Woosley retained an attorney to appear in the September 24, 1992 adoption proceedings. On March 1, 1993, a Texas court entered a Decree of Adoption in favor of the Smiths.

Appendix A

On July 13, 1993, a year after voluntarily relinquishing his interest in Kyle, Woosley filed suit in of Bexar County, Texas seeking to set aside both the decree terminating his parental rights and the adoption decree. Over the next two years, Woosley amended his complaint several times. On May 31, 1995, he filed a fourth and final amended complaint in which he alleged, *inter alia*: (1) that the Texas court lacked personal and subject matter jurisdiction to terminate his parental rights; (2) that the Alliance's procedures violated his rights to due process and equal protection under the laws; (3) that the entry of the decree terminating his parental rights violated due process and equal protection of the laws; and (4) that Alliance perpetrated fraud by transporting Kyle to Texas and terminating his parental rights under Texas rather than Pennsylvania law. In 1994 and 1995, Woosley also filed other suits in Pennsylvania state court and Texas state courts, both of which are pending.[2]

On August 22, 1995, the Bexar County District Court granted summary judgment to the Smiths and Alliance. On appeal, Woosley contended the decree terminating his parental rights was void as a matter of law under Tex.R.Civ.P. § 301.[3] On April 10, 1996, the Texas Court of Appeals

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2. *Woosley v. Kottler*, No. GD 94-10486, Court of Common Pleas of Allegheny County, PA; *Woosley v. The Adoption Alliance*, No. 95-PA-01117, 225th Judicial District, Bexar County, Texas.

3. Tex.R.Civ.P. 301 provides that only one final judgment shall be rendered in any one suit. Woosley contended that the court's issuing of two decrees (the first decree, by which the biological parents' rights were terminated, and the second decree, by which

(Cont'd)

affirmed the grant of summary judgment in favor of the Smiths and Alliance on the grounds that the first decree was a final judgment because it disposed of all parties and issues raised by the pleadings.[4] *Woosley v. Smith et al.*, 925 S.W.2d 84, 86-87 (Tex. Ct. App. 1996).

On December 31, 1996, Woosley filed a federal complaint in the Western District of Pennsylvania containing three counts: violation of 28 U.S.C. § 1738A, the Parental Kidnaping Prevention Act; violation of 42 U.S.C. § 1983; and fraud. On January 28, 1997, Woosley filed an amended complaint which added a fourth count alleging violation of the 14th Amendment. Woosley voluntarily withdrew the first count after defendants moved to dismiss it citing *Thompson v. Thompson*, 484 U.S. 174, 178-79, 108 S.Ct. 513, 516, 98 L.Ed.2d 512 (1998) (holding that the Prevention of Kidnaping Act does not provide a private cause of action). On September 23, 1998, the District Court dismissed the remaining counts.

Woosley filed this appeal on October 19, 1998.

(Cont'd)

the presumed father's parental rights were terminated) represent two final judgments in the underlying termination action. Woosley argued on appeal that the first Decree terminating his parental rights was void as a matter of law.

4. Even assuming this failure to view the facts and inferences in a light most favorable to Woosley was error, we lack jurisdiction to reverse such a finding.

II.

We have jurisdiction under 28 U.S.C. § 1291 and exercise plenary review over the grant of a motion to dismiss. *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1411 (3d Cir. 1993). The District Court found that Woosley's § 1983 and fraud claims were barred by 42 Pa. Stat. Ann. § 5524. We agree.

The United States Supreme Court has held that claims brought under § 1983 are best characterized as personal injury claims. *Wilson v. Garcia*, 471 U.S. 261, 275-76, 105 S.Ct. 1938, 1946-47, 85 L.Ed.2d 254 (1985).

> In essence, § 1983 creates a cause of action where there has been an injury, under color of state law, to the person or to the constitutional or federal statutory rights which emanate from or are guaranteed to the person. In the broad sense, every cause of action under § 1983 which is well-founded results from 'personal injuries.'

Id. at 278 (quoting *Almond v. Kent*, 459 F.2d 200, 204 (4th Cir. 1972)). The *Wilson* court also analyzed whether a state or federal statute of limitations should apply for § 1983 claims brought in federal court. The *Wilson* court held that each state's statute of limitations should apply to § 1983 claims in order to preserve the federal interests in uniformity, certainty and the minimization of unnecessary litigation. *Id.* at 275.

In Pennsylvania, the statute of limitations in actions alleging personal injury and fraud is two years. 42 Pa. Cons.

Stat. Ann. § 5524(2)(7).[5] Generally, the statute of limitations begins to run as soon as the underlying cause of action accrues. *See, e.g., Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc.*, 503 Pa. 80, 84, 468 A.2d 468, 471 (1983). Most tort causes of action accrue when the injury is sustained. *Bohus v. Beloff*, 950 F.2d 919, 924 (3d Cir. 1991) (citing *Levenson v. Souser*, 384 Pa. Super. 132, 143-44, 557 A.2d 1081 (1989)). "Once a cause of action has accrued and the statutory period for bringing the action has expired, an injured party is barred from bringing suit unless the statute of limitations has been tolled." *Bohus*, 950 F.2d at 924.

Pennsylvania courts have developed tolling principles to "ameliorate the sometimes-harsh effects" of the statute of limitations. *Cathcart v. Keene Indus. Insulation*, 324 Pa. Super. 123, 135, 471 A.2d 493, 500 (1984). The discovery rule tolls the statute of limitations when a plaintiff is unable to know the cause or existence of the injury despite the exercise of due diligence. *Pocono*, 503 Pa. at 85, 468 A.2d at 471. The statute of limitations begins to run when a plaintiff knows or reasonably should know "(1) that he has been injured; and (2) that his injury has been caused by another." *Bohus*, 950 F.2d at 924; *see also Cowgill v. Raymark Industries, Inc.*, 780 F.2d 324, 330 (3d Cir. 1986).

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5. The following actions and proceedings must be commenced within two years: . . . (2) An action to recover damages for injuries to the person. . . . (7) Any other action or proceeding to recover damages for injury to person or property which is founded on negligent, intentional or otherwise tortious conduct or any other action or proceeding sounding in trespass, including deceit or fraud, except an action or proceeding subject to another limitation specified in this subchapter. 42 Pa. Cons. Stat. Ann. § 5524 (West 1999).

"[S]tate tolling principles are generally to be used by a federal court when it is applying a state limitations period." *Bohus*, 950 F.2d at 924 (quoting *Vernau v. Vic's Market, Inc.*, 896 F.2d 43, 45 (3d Cir. 1990)). Under Pennsylvania law, a plaintiff bears the duty to exercise reasonable diligence to ascertain the injury on which the right to recovery is based and to institute his suit within the prescribed statutory period. *See, e.g.*, *Ciccarelli v. Carey Canadian Mines, Ltd.*, 757 F.2d 548, 555-56 (3d Cir. 1985) (finding that a statute of limitations does not violate due process if the statutory period is otherwise reasonable). It is not the plaintiff's actual knowledge, but rather "whether the knowledge was known, or through the exercise of diligence, knowable to [the] plaintiff." *O'Brien v. Eli Lilly & Co.*, 668 F.2d 704, 711 (3d Cir. 1981).

Pennsylvania courts have also adopted the fraudulent concealment doctrine which tolls the statute of limitation where "through fraud or concealment the defendant causes the plaintiff to relax his vigilance or deviate from the right of inquiry." *Ciccarelli*, 757 F.2d at 556; *see also Urland v. Merrell-Dow Pharmaceuticals, Inc.*, 822 F.2d 1268, 1271 (3d. Cir 1987) ("A party relying on this doctrine will be entitled to a tolling of the statute of limitations by proving that there had been either intentional or unintentional deception by the defendant."). The statute of limitations is tolled until the plaintiff has "knowledge of the facts constituting the cause of action or by reasonable diligence should have had such knowledge." *Urland*, 822 F.2d at 1274 (quoting *Williams v. Pittsburgh Terminal Coal Corp.*, 62 F.2d 924, 925 (3d Cir. 1933)). Under Pennsylvania law, it is the plaintiff's burden to establish that he is entitled to the

application of tolling principles. *Cochran v. GAF Corp.*, 542 Pa. 210, 216, 666 A.2d 245, 249 (1995).

Although Woosley concedes that his fraud and § 1983 claims are subject to the two-year statute of limitations, he contends that the prescribed two-year period should not run until after the decision rendered by the Texas Court of Appeals on April 10, 1996. Woosley contends that 42 Pa. Cons. Stat. Ann. § 5535(a) allows him one year after the decision by Texas Court of Appeals to refile on the grounds that it was not a judgment on the merits.[6] But, § 5535(a) clearly cannot apply to a suit brought in Texas.

It is also clear that Woosley's present suit is barred by the Pennsylvania two-year statute of limitations. Woosley knew that his parental rights had been terminated at least by August 26, 1992 when he retained an attorney to represent

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6. 42 Pa. Cons. Stat. 5535 "(a) Termination of prior matter. —

> (1) If a civil action or proceeding is timely commenced and is terminated, a party, or his successor in interest, may, notwithstanding any other provision of this subchapter, commence a new action or proceeding upon the same cause of action within one year after the termination and any other party may interpose any defense or claim which might have been interposed in the original action or proceeding.
>
> (2) Paragraph (1) does not apply to: .... (ii) An action or proceeding terminated by a voluntary nonsuit, a discontinuance, a dismissal for neglect to prosecute the action or proceeding, or a final judgment upon the merits."

him in the termination proceedings on September 24, 1992. The latest conceivable point from which to begin running of the statute of limitations is June 1993, when Woosley filed his first suit in Bexar County, Texas. Under either measure, Woosley was barred from filing this suit.

Statutes of limitations give plaintiffs "what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *Ciccarelli*, 757 F.2d at 555 (quoting *United States v. Kubrick*, 444 U.S. 111, 117, 100 S.Ct. 352, 356-57, 62 L.Ed.2d 259 (1979)). Furthermore,

> [S]tatutes of limitations are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

Ciccarelli, 757 F.2d at 555 (quoting *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314, 65 S.Ct. 1137, 1142, 89 L.Ed. 1628 (1945)). The District Court properly applied the two-year Pennsylvania statute of limitations. We will affirm the dismissal of Woosley's untimely claims.[7]

Although the statute of limitations issue is dispositive, it is questionable whether there is federal subject matter jurisdiction in this case. The *Rooker-Feldman* doctrine holds that "[u]nder 28 U.S.C. § 1257, state court litigants who have appealed an adverse judgment through the state system may seek review in the United States Supreme Court; the lower federal courts [however] may not sit in direct review of the decisions of a state tribunal." *Gulla v. North Strabane Township*, 146 F.3d 168, 171 (3d Cir. 1998) (citing *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303, 1314-15, 75 L.Ed.2d 206 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416, 44 S.Ct. 149, 150, 68 L.Ed.2d 362 (1923)). The *Rooker-Feldman* doctrine prohibits lower federal courts from exercising "subject matter jurisdiction to review final adjudications of a state's highest

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7. Woosley also claims a violation of due process and seeks to nullify the Texas decrees, asserting both a legal right and a legal remedy. "[W]hen the jurisdiction of the federal court is concurrent with that at law, or the suit is brought in aid of a legal right, equity will withhold its remedy if the legal right is barred by the local statute of limitations." *Algrant v. Evergreen Valley Nurseries Ltd. Partnership*, 126 F.3d 178, 181-82 (3d Cir. 1997) (quoting *Russell v. Todd*, 309 U.S. 280, 289, 60 S.Ct. 527, 532, 84 L.Ed. 754 (1940)). Accordingly, "[w]hen plaintiffs' claims are barred by a statute of limitations applicable to a concurrent legal remedy, then a court will withhold declaratory judgment relief in an independent suit essentially predicated upon the same cause of action." *Id.* at 185.

court or to evaluate constitutional claims that are 'inexplicably intertwined with the state court's [decision] in a judicial proceeding.' " *Ernst v. Child & Youth Services of Chester County*, 108 F.3d 486, 491 (3d Cir. 1997) (quoting *FOCUS v. Allegheny County Ct. of Common Pleas*, 75 F.3d 834, 840 (3d Cir. 1996). Although Woosley contends that his federal claim is an original civil rights action, he concedes that if he had not received unfavorable judgments in the Texas courts, he would not have filed the federal action. It would appear, therefore, that subject matter jurisdiction is doubtful here.[8]

III.

For the reasons given, we will affirm the dismissal of Woosley's federal complaint.

TO THE CLERK:

Please file the foregoing opinion.

Anthony J. Scirica
Circuit Judge

DATED: August 25, 1999

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8. The domestic relations exception also suggests lack of federal subject matter jurisdiction. In *Ankenbrandt v. Richards*, 504 U.S. 689, 700, 112 S.Ct. 2206, 2213, 119 L.Ed.2d 468 (1992), the Supreme Court reaffirmed the long-standing rule that domestic disputes involving divorce, custody or alimony issues are the province of state courts. *See, e.g., Allen v Allen*, 48 F.3d 259, 261 (7th Cir. 1995) (holding that the *Rooker-Feldman* doctrine precluded the District Court from adjudicating a claim by a biological father who sought voidance of state visitation and custody orders previously entered in favor of another).

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-3563

PAUL DAVID WOOSLEY,

Appellant

v.

DAVID SMITH; KIMBERLY SMITH, h/w; THE ADOPTION ALLIANCE; MARILYN J. MONTGOMERY

On Appeal from the United States District Court
for the Western District of Pennsylvania
D.C. Civil Action No. 96-cv-02368
(Honorable Gary L. Lancaster)

Submitted Pursuant to Third Circuit LAR 34.1(a)
July 26, 1999

Before: SCIRICA and STAPLETON, *Circuit Judges*, and SHAPIRO, *District Judge**

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Western District of

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* The Honorable Norma L. Shapiro, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on July 26, 1999. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this court that the judgment of the District Court entered September 24, 1998, be, and the same is hereby affirmed.

Costs taxed against appellant.

ATTEST:

s/ [illegible]
Chief Deputy Clerk

DATED: August 25, 1999

APPENDIX B — MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA DATED AUGUST 20, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 96-2368
Re: Docs.# 74 and 77

JUDGE LANCASTER
MAGISTRATE JUDGE CAIAZZA

PAUL DAVID WOOSLEY,

Plaintiff,

v.

DAVID AND KIMBERLY SMITH
and
THE ADOPTION ALLIANCE and
MARILYN J. MONTGOMERY,

Defendants.

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I.
RECOMMENDATION

It is recommended that the Motion to Dismiss filed by the Adoption Alliance and Marilyn Montgomery at document

number seventy-four be granted. It is also recommended that the Motion to Dismiss filed by David and Kimberly Smith and document number seventy-seven be granted.

II.
REPORT

Paul David Woosley's (Woosley) lawsuit results from a myriad of circumstances which relate to the termination of his parental rights to his son. Each party named as a defendant in this action has a separate and distinct role. David and Kimberly Smith (the Smiths) are residents of Fairfield, Connecticut and are the child's adoptive parents. The Adoption Alliance (Alliance) is an adoption agency organized and regulated under the laws of the state of Texas. (Am. Compl. at ¶4). Marilyn J. Montgomery (Montgomery), a resident and licensed notary of the state of Texas, facilitated Woosley's signature on the documents which ultimately lead to the termination of his parental rights. (*Id.* at ¶¶6 and 12).

On August 26, 1997, the court dismissed Woosley's Fourteenth Amendment claim against all of the defendants and his 42 U.S.C. § 1983 action against the Smiths following a consideration of the initial Motions to Dismiss filed by each defendant. However, Woosley's claims for violations of 42 U.S.C. § 1983 (Count II) and fraud (Count III) against the Alliance and Montgomery survived their Motion to Dismiss. Also, Woosley's fraud claim against the Smiths remained viable after the court resolved their Motion to Dismiss.

Pursuant to an Order of Court dated July 14, 1998, Woosley filed a Second Amended Complaint on July 30,

1998, which added a conspiracy claim under § 1983 against the Smiths in Count V.

Currently before the court for consideration is a Motion to Dismiss and a Motion for Summary Judgment filed by the Alliance and Montgomery at document number seventy-four and a Motion to Dismiss and a Motion for Summary Judgment filed by the Smiths at document number seventy-seven. The defendants each support their respective motions with three legal arguments which are based upon: (1) statute of limitations; (2) Rooker-Feldman doctrine; and (3) *Colorado River* doctrine. Because the court concludes that Woosley's remaining claims against the defendants are barred by the applicable statute of limitations pursuant to the opinion of the United States Court of Appeals for the Third Circuit (Third Circuit) in *Algrant v. Evergreen Valley Nurseries Limited Partnership*, 126 F.3d 178 (3d Cir. 1997), the defendants' motions will be analyzed as motions to dismiss.[1] The relevant facts are these.

A. Facts

On July 8, 1992, a child was born to Kymberley Susan Fusco (Fusco) and Paul David Woosley in Pennsylvania. (Mem. of Law Submitted by Defs., the Adoption Alliance and Marilyn J. Montgomery, in Supp. of Mot. for Summ J. and Mot. to Dismiss at 2.) Prior to the birth of the child, Fusco proposed that their child be placed for adoption;

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1. The disposition of Woosley's § 1983 claims under the applicable two year statute of limitations also applies to Count V of Woosley's Second Amended Complaint.

however, Woosley was not readily agreeable to her suggestion. (Pl.'s Resp. to Def.'s Mot. to Dismiss and for Summ. J. at 3.) Following a consultation with an attorney, Woosley allegedly learned that Pennsylvania law provided to him a minimum period of forty days during which he could reconsider his decision to voluntarily relinquish his parental rights. (*Id.*); see also 23 Pa. C.S.A. § 2504.

On July 11, 1992, Woosley met with Montgomery at Sewickley Valley Hospital. (*Id.* at 4.) Montgomery instructed Woosley to sign a document entitled Affidavit of Waiver of Interest in Child (Affidavit), and advised him that the document would become effective only if he chose to place the child for adoption. (*Id.*) The document did not state that the termination of his parental rights would be subject to the laws of the state of Texas. (*Id.*)

Immediately after Woosley signed the Affidavit, Montgomery transported the child to San Antonio, Bexar County, Texas. (Mem. of Law Submitted by Defs., The Adoption Alliance and Marilyn J. Montgomery, in Supp. of Mot. for Summ J. and Mot. to Dismiss at 2.) The Smiths then followed the child to San Antonio, Texas. (*Id.*) On July 15, 1992, the Alliance filed a Petition to Terminate the Parent-Child Relationship in the court of Bexar County, Texas, and that same day the court entered a decree which terminated Woosley's parental rights. (*Id.* at 3.)

On July 24, 1992, thirteen days after signing the Affidavit, Woosley, assuming that he was acting in a timely fashion, informed the Alliance that he revoked his decision to voluntarily relinquish his parental rights to the child. (Pl.'s

Resp. to Def.'s Mot. to Dismiss and for Summ. J. at 6.) However, during this approximate time period, the Alliance was arranging for the State of Connecticut Department of Children and Youth Services Interstate Compacts (Interstate Compact Office) to approve the adoption. (*Id.*) The Interstate Compact Office formally approved the placement of the child with the Smiths on August 14, 1992. (Mem. of Law Submitted by Defs., The Adoption Alliance and Marilyn J. Montgomery, in Supp. of Mot. for Summ J. and Mot. to Dismiss at 2.)

Although Woosley continued to contact the Alliance throughout August 1992, his attempts to learn the whereabouts of his son were unsuccessful. (Pl.'s Resp. to Def.'s Mot. to Dismiss and for Summ. J. at 6.) On August 26, 1992, the Executive Director of the Alliance finally informed Woosley that the Bexar County Court had terminated his parental rights. (*Id.*) Woosley subsequently retained an attorney to enter an appearance in the termination proceedings on September 24, 1992. (Am. Compl. at ¶ 33.)

On January 8, 1993, the Smiths filed a Petition for Adoption, and on March 1, 1993, a Texas court entered a Decree of Adoption in favor of the Smiths. (*Id.* at ¶ 34.)

On July 13, 1993, Woosley filed a Suit to Set Aside Void Judgment or in the Alternative Original Petition for Bill of Review in the 225th Judicial District of Bexar County, Texas. (Mem. of Law Submitted by Defs., The Adoption Alliance and Marilyn J. Montgomery, in Supp. of Mot. for Summ J. and Mot. to Dismiss at 3.) Woosley amended the suit several times over the next two years, and on May 31, 1995, he filed

his final amendment entitled Fourth Amended Suit to Set Aside Void Judgment or in the Alternative for Bill of Review and Amended Petition for Damages (Fourth Amended Suit). (Mem. of Law Submitted by Defs., The Adoption Alliance and Marilyn J. Montgomery, in Supp. of Mot. for Summ. J. and Mot. to Dismiss at 4.) The Fourth Amended Suit alleged, *inter alia*: (1) a lack of jurisdiction in the Texas courts to terminate Woosley's rights; (2) that the Alliance's procedures violated Woosley's rights to due process and equal protection of the laws; (3) that the entry of the decree which terminated Woosley's parental rights violated due process and equal protection; and (4) that the Alliance perpetrated fraud by transporting the child to Texas and terminating his parental rights under Texas rather than Pennsylvania law. (Aff. in Supp. of Mot. for Summ. J. Filed by Defs. The Adoption Alliance and Marilyn J. Montgomery Ex. D at 36-41.)

In an order dated August 22, 1995, the District Court for the 225th Judicial District summarily granted the Motion for Summary Judgment filed by the Smiths and the Alliance and denied Woosley's Motion for Summary Judgment. (*Id.* Ex. E at 53 and 54.) The order did not discuss the merits of each parties' motion or the court's rationale for its decision.

On April 10, 1996, the Court of Appeals of Texas, San Antonio (Court of Appeals), affirmed the district court's grant of summary judgment in the proceeding which challenged the decree that terminated Woosley's parental rights. *Woosley v. Smith et. al.*, 925 S.W. 2d 84, 85 (1996). Relatedly, the Court of Appeals affirmed the District Court on a procedural basis and it did not review the merits of Woosley's Fourth Amended Suit. *Woosley*, 925 S.W. 2d at 86-87.

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Woosley commenced his present lawsuit in this court on December 31, 1996.

B. Discussion

Woosley's substantive claims which are pertinent to the motions now before the court for resolution are related to his § 1983 and fraud actions. In both causes of action, he requests the following relief:

> (1) An Order from this Honorable Court declaring that Plaintiff's parental rights have not been terminated because the Texas Court which entered such Order did not have jurisdiction over the matter, and thus, Plaintiff's due process rights were violated;
>
> (2) An Order from this Honorable Court setting aside the Adoption Decree and permanently enjoining Defendants from enforcing the Order of the Texas Court which granted the adoption of Woosley's son;
>
> (3) Punitive damages, attorney's fees, interest, costs and other monetary relief to compensate Plaintiff for being denied the opportunity to parent his son.

To support their respective motions, the defendants' initially argue that both Woosley's § 1983 and fraud claims are barred by the applicable statute of limitations.

Appendix B

The limitations period of the state personal injury statute governs claims filed under 42 U.S.C. § 1983. *Wilson v. Garcia*, 471 U.S. 261, 276-80 (1985). Here, this court must apply Pennsylvania's two year personal injury statute. *Smith v. Holtz*, 856 F.Supp. 227, 231 (M.D. Pa. 1994); 42 Pa. C.S.A. section 5524(2). Similarly, Pennsylvania's statute of limitations for fraud claims is two years. 42 Pa. C.S.A. section 5524(7).[2]

A statute of limitations begins to run its course in Pennsylvania when " 'the right to institute and maintain the suit arises.' " *Beauty Time, Inc. v. VU Skin Systems, Inc.*, 118 F.3d 140, 143-4 (3d Cir. 1997) (*quoting Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc.*, 503 Pa. 80, 468 A.2d 468, 471 (1983)). Pennsylvania " 'delays the running of the statute [of limitations] until the plaintiff knew, or through the exercise of reasonable diligence should have known, of the injury and its cause.' " *Beauty Time, Inc.*, 118 F.3d at 144 (*quoting Urland v. Merrell-Dow Pharmaceuticals*, 822 F.2d 1268, 1271 (3d Cir. 1987).

Woosley's Amended Complaint explicitly states that the Director of the Alliance informed him on August 26, 1992, that the Texas court had entered a final order which terminated his parental rights. (Am. Compl. ¶ 32.) This

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2. 28 U.S.C.A. § 1332 confers this court's original jurisdiction over this lawsuit under diversity of citizenship. A federal court sitting in a diversity case must apply the substantive law of the state in which the court sits. *See Erie Railroad Co. v. Thompkins*, 304 U.S. 64 (1938). A federal court sitting in a diversity case will also apply the statute of limitations of the forum state. *Schenk v. Piper Aircraft Corp.*, 377 F.Supp. 478-9 (W.D. Pa. 1974).

notification caused Woosley to retain an attorney who entered an appearance in the adoption proceedings on September 24, 1992. (*Id.* ¶ 33.) Furthermore, Woosley's Fourth Amended Suit which he initiated on July 13, 1993, also alleged fraud and deprivations of his Constitutional rights.

Based upon this record, Woosley arguably knew of his Constitutional and fraud claims as early as August 1992 and he apparently understood his potential causes of action against the defendants by July 1993. Therefore, the two year limitations period for both claims expired as early as August 1994 or as late as July 1995. Under either scenario, the instant case, which was filed in December 1996, was clearly commenced after the expiration of the relevant statute of limitations. Woosley attempts to circumvent the statute of limitations barrier by characterizing the nature of the declaratory relief requested in his Amended Complaint as equitable.

A federal court's application of a state statute of limitations depends upon whether the plaintiff seeks an equitable or legal remedy. *See Federal Election Commission v. The Christian Coalition*, 965 F.Supp. 66, 71 (D.D.C. 1997). Cases based upon equity's exclusive jurisdiction include:

> . . . all civil cases in which the remedy to be granted is purely equitable, or one which is recognized by courts of equity, and not by courts of law. In the cases of this class, the primary right which is maintained, redressed or enforced is sometimes equitable and is sometimes legal; but

> the jurisdiction depends, not upon the nature of these rights, estates, or interests, but wholly upon the nature of the remedies.

Federal Election Commission, 965 F.Supp. at 71 (*quoting* Pomeroy's Equity Jurisprudence § 138 (5th ed. 1941)). "[W]here the equity jurisdiction is exclusive and is not exercised in aid or support of a legal right, state statute of limitations barring actions at law are inapplicable, and in the absence of any state statute barring the equitable remedy in like cases, the federal court is remitted to and applies the doctrine of laches as controlling." *Russell et. al. v. Todd et. al.*, 309 U.S. 280, 289 (1940).

In contrast, the equitable concept of concurrent jurisdiction "lies where the right is cognizable by the law and the remedy is of the same kind. . . ." *Federal Election Commission*, 965 F.Supp. at 71. Under concurrent jurisdiction:

> law must, through its judicial procedure, give some remedy of the same general nature as that given by equity, but this legal remedy is not, under the circumstances, full, adequate and complete. The fact that the legal remedy is not full, adequate, and complete is, therefore, the real foundation of this concurrent branch of the equity jurisdiction.

Federal Election Commission, 965 F.Supp. at 71 (*quoting* Pomeroy's Equity Jurisprudence § 139 (5th ed. 1941)). "[W]hen the jurisdiction of the federal court is concurrent with that of law, or the suit is brought in aid of a legal right,

equity will withhold its remedy if the legal right is barred by the local statute of limitations." *Russell*, 309 U.S. at 289.

Here, the ultimate purpose of the declaration sought by Woosley is to redress a violation of his right to due process of the law. The corresponding relief he seeks is a nullification of the order of the Texas court and a reinstatement of his parental rights. Therefore, Woosley asserts both a legal right and a legal remedy which lie within the principles of concurrent jurisdiction.

In *Algrant v. Evergreen Valley Nurseries Limited Partnership*, 126 F.3d 178 (3d Cir. 1997), the Third Circuit recently affirmed the concurrent jurisdiction principles stated in *Russell* by holding: "when plaintiffs' claims are barred by a statute of limitations applicable to a concurrent legal remedy, then a court will withhold declaratory judgment relief in an independent suit essentially predicated upon the same cause of action." *Algrant v. Evergreen Valley Nurseries Limited Partnership*, 126 F.3d 178, 185 (3d Cir. 1997). Given that Woosley filed this lawsuit following the expiration of the two year statute of limitations applicable to his § 1983 claim and his fraud claim, this court can not grant the declaratory judgment sought by Woosley. Accordingly, the court must grant the defendants' respective Motions to Dismiss.

In accordance with the Magistrate's Act, 28 U.S.C. § 636(b)(1)(B) and (C), and Rule 72.1.4(B) of the Local Rules for Magistrates, objections to this Report and

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Recommendation are due by September 8, 1998. Responses to objections are due by September 18, 1998.

August 20, 1998

s/ Francis X. Caiazza
FRANCIS X. CAIAZZA
U.S. Magistrate Judge

APPENDIX C — MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA DATED SEPTEMBER 23, 1998

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 96-2368
Judge Lancaster
Magistrate Judge Caiazza
In Re: Documents #74, 77

PAUL DAVID WOOSLEY,

Plaintiff,

v.

DAVID AND KIMBERLY SMITH, THE ADOPTION ALLIANCE, MARILYN J. MONTGOMERY,

Defendants.

MEMORANDUM ORDER

On January 2, 1997, this case was referred to United States Magistrate Judge Francis X. Caiazza for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. §§ 636(b)(1)(A) and (B) , and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates.

The magistrate judge's Report and Recommendation, filed on August 20, 1998, recommended that the Motion to

Appendix C

Dismiss filed by the Adoption Alliance and Marilyn Montgomery at document number seventy-four (#74) should be granted. It was also recommended that the Motion to Dismiss filed by David and Kimberly Smith at document number seventy-seven (#77) should be granted. The parties were allowed ten (10) days from the date of service to file objections. Service was made on all parties and objections were filed by the Plaintiff on September 8, 1998. After *de novo* review of the pleadings and documents in the case, together with the Report and Recommendation and objections thereto, the following order is entered:

AND NOW, this 23rd day of Sept, 1998,

IT IS HEREBY ORDERED that the Motion to Dismiss filed by the Adoption Alliance and Marilyn Montgomery at document number seventy-four is granted.

IT IS FURTHER ORDERED that the Motion to Dismiss filed by David and Kimberly Smith and document number seventy-seven is granted.

The Report and Recommendation of Magistrate Judge Caiazza, Document No. 151, dated August 20, 1998, is adopted as the opinion of the court.

s/ Gary L. Lancaster
Gary L. Lancaster
United States District Court Judge

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA DATED JULY 14, 1998

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 96-2368
Judge Lancaster
Magistrate Judge Caiazza
In Re: Document #122

PAUL DAVID WOOSLEY,

Plaintiff,

v.

DAVID AND KIMBERLY SMITH, THE ADOPTION ALLIANCE, MARILYN J. MONTGOMERY,

Defendants.

ORDER

In his Motion To Amend Complaint the Plaintiff seeks to add the adopting parents, David and Kimberly Smith (the Smiths), as Defendants in this action. He essentially claims that the Smiths "conspired to deprive him of his constitutional right to be a parent to his son." *See* Mot. to Amend Compl. ¶ 3. Pursuant to the provisions of an earlier motion this court dismissed the action as it related to the Smiths because they were not state actors and because the

Plaintiff failed to sufficiently allege a conspiracy with a state actor.[1]

In their proposed Amended Complaint the Plaintiff alleges: that the Smiths retained a New York attorney "for the purpose of circumventing the protections afforded to natural parents under Pennsylvania law." (Second Am. Compl. ¶ 55); that "[t]he Smiths were aware of the procedure for completing an adoption in Pennsylvania, Texas and Connecticut" and that "[t]hey decided that the most convenient and expedient manner to terminate the parental rights of Plaintiff and complete the adoption would be to attempt to subject him to the laws of Texas." (Second Am. Compl. ¶ 56); that "the Smith's contacted and retained The Adoption Alliance, even though they knew or should have known that the Adoption Alliance was not a licensed adoption agency in Pennsylvania." (Second Am. Compl. ¶ 57); that the Adoption Alliance agreed to "act on behalf of the Smith's by filing the Petition to Terminate the parental rights of Plaintiff with the Texas court." (Second Am. Compl. 58); and that "[t]he Smith's were completely indifferent to the rights of Mr. Woosley under Pennsylvania law" and that "they concealed their true intentions from Mr. Woosley in order to prevent him from exercising his rights under Pennsylvania law." (Second Am. Compl. ¶ 59).

A conspiracy which involves private persons with state actors must satisfy the color of state law requirement as imposed by 42 U.S.C. § 1983. In that regard, it is insufficient

1. In order to state a cause of action under § 1983 a plaintiff must show that he or she was deprived of a federally secured right by a person acting under color of state law. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981).

to state conclusory allegations with regard to the existence of a conspiracy. *Glaros v. Perse*, 628 F.2d 679 (1st Cir. 1980). The United States Court of Appeals for the Third Circuit has held that plaintiffs are required to plead facts with specificity in § 1983 cases. *United States v. City of Philadelphia*, 644 F.2d 187, 204 (3d Cir. 1980); *Rotolo v. Borough of Charleroi*, 532 F.2d 920, 922-925 (3d Cir. 1976) (per curiam). The specificity requirement applies in equal measure to allegations which claim that private parties engaged in a conspiracy with state actors. *Chicarelli v. Plymouth Garden Apartments*, 551 F. Supp. 532, 539-40 (E.D. Pa. 1982). Significantly, an agreement to perform an unlawful act serves as the basis of a conspiracy. *Ammlung v. City of Chester*, 494 F.2d 811, 814 (3d Cir 1974). "It is not enough . . . to show that the private and state actors might have had a common goal unless there is a factually specific allegation that they directed toward an unconstitutional act by virtue of a mutual understanding or agreement." *Hauptmann v. Wilentz*, 570 F. Supp. 351, 382 (D.N.J. 1983) (*citing Tarkowski v. Bartlett Realty*, 644 F. Supp. 1204, 1206 (7th Cir. 1980).

Here, the court finds that the Plaintiff has satisfied the pleading requirements as to the Smith's and, accordingly, the court will permit the Plaintiff to file an amended complaint as to the Smiths. ***However, the Amended Complaint shall be in the same form as the First Amended Complaint and the Plaintiff shall merely add a new count which relates to the alleged acts of the Smiths.***

July 14, 1998

s/ Francis X. Caiazza
FRANCIS X. CAIAZZA
U.S. Magistrate Judge

APPENDIX E — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED SEPTEMBER 21, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-3563

PAUL DAVID WOOSLEY,

Appellant

v.

DAVID SMITH; KIMBERLY SMITH, h/w; THE ADOPTION ALLIANCE; MARILYN J. MONTGOMERY

(D.C. Civ. No. 96-cv-02368)

SUR PETITION FOR REHEARING

Present: BECKER, *Chief Judge*,
SLOVITER, MANSMANN, GREENBERG, SCIRICA,
NYGAARD, ALITO, ROTH, McKEE
RENDELL and STAPLETON*, *Circuit Judges*,
and SHAPIRO**, *District Judge*

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* As to panel rehearing only.

** The Honorable Norma L. Shapiro, United States District Judge for the Eastern District of Pennsylvania, who sat by designation, as to panel rehearing only.

Appendix E

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

s/ [illegible]
Circuit Judge

Dated: **SEP 21 1999**